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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARC A. GROSSMAN et al., Plaintiffs and Appellants, v. PACIFIC LIFE INSURANCE COMPANY, Defendant and Respondent.	G047519 (Super. Ct. No. 30-2008-00107691) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Hall & Bailey and Donald R. Hall for Plaintiffs and Appellants.

Reed Smith, Thomas A. Evans, Raymond A. Cardozo and Maria E. Jones for Defendant and Respondent.

Plaintiffs appeal from a judgment in favor of defendant Pacific Life Insurance Company (Pacific Life) in an action for fraud and negligent hiring. Plaintiffs assert the trial court erred in three respects. They contend, first, that the trial court abused its discretion in denying a motion for new trial based on purported misconduct by a juror, defense counsel, and trial court personnel. Additionally, plaintiffs assert the trial court erred in excluding certain evidence and in refusing a requested jury instruction.

None of plaintiffs' arguments has merit. Consequently, we affirm the judgment.

FACTS

Plaintiffs are two married couples, Marc and Jane Grossman and Gaetano and Carolina Zanfini, who purchased high face value life insurance policies issued by Pacific Life. Plaintiffs alleged in their complaint that Pacific Life's independent insurance agent, Gerald Sherman, steered them into purchasing life insurance policies "with a face amount . . . that was wildly in excess of their needs." At Sherman's urging, the Zanfinis bought a policy with a face value of $30 million, and the Grossmans purchased life insurance policies with a collective face value of $48 million. The complaint further alleged that Sherman used fraudulent tactics to entice plaintiffs into purchasing these insurance policies, falsely assuring them that they could cancel or reduce the face amount of the policies without penalty after one year (the policies actually penalized any reduction before five years), and that his sales commission on the policies was 2.5 percent (his commission was much higher).

Plaintiffs sued Sherman, Pacific Life, and others, for rescission, reformation, fraud, misrepresentation, negligence, and negligent hiring. All defendants settled but Pacific Life. The case proceeded to a jury trial against Pacific Life in June of 2012. Plaintiffs sought to hold Pacific Life vicariously liable for Sherman's alleged fraud based on theories of agency and negligent supervision. After a three-week trial, the jury returned verdicts in favor of Pacific Life and against the plaintiffs on all claims. The jury

specifically found that Sherman made no "false representation of an important fact" to any of the plaintiffs.

The New Trial Motion

Weeks after the trial ended, plaintiffs' counsel retained a private investigator, Linda Rowel, to investigate potential juror misconduct. Information unearthed by Rowel supplied the basis of plaintiffs' motion for new trial. Specifically, plaintiffs contended in the motion that jury foreman William Grennell, an executive with the Orange County Council for the Boy Scouts of America (OCCBS), intentionally concealed during voir dire that he was biased in favor of defendant Pacific Life and that he knew Pacific Life provided financial and volunteer support to his employer OCCBS.

Rowel's declaration, submitted in support of the new trial motion, asserted that Grennell told her that Pacific Life was a "'long time'" donor of OCCBS, and that he personally knew two Pacific Life employees who were current volunteers with OCCBS, one of whom Grennell directly supervised. Moreover, Rowel stated Grennell described having called the volunteer he supervised to discuss the case after the trial was over, but the man knew nothing about the lawsuit.

During voir dire, Grennell was not among the first group of prospective jurors, and thus he escaped the more extensive initial questioning, including queries into whether anyone knew the trial attorneys or had "any connection" with the parties. Grennell watched as two people in the first group volunteered that they had loved ones ("My girlfriend that I live with"; "My daughter") who worked for Pacific Life, and Grennell eventually saw plaintiffs' counsel use peremptory challenges to excuse these two, and another person, from the jury.

When Grennell was put in the jury box with the next "six pack" of prospective jurors, he and the others were merely asked collectively if they had heard the prior questions, and all nodded affirmatively. The trial court invited Grennell to provide a brief background about himself, which he did, including the fact that he was a district

executive for OCCBS and that he had strong ties to the National Rifle Association (NRA). Neither party asked Grennell about his work for OCCBS. Plaintiffs' counsel asked only about Grennell's NRA affiliation and prior life insurance policies. Nevertheless, plaintiffs argued in the new trial motion that Grennell committed juror misconduct during voir dire when he "intentionally concealed the association between [OCCBS] and Pacific Life Insurance Company as well as Grennell's association with at least two Pacific Life employees."

Plaintiffs further argued, based on "[t]he doctrines of waiver and estoppel," that Pacific Life "forfeited its right to oppose a new trial" by its failure to inform the court of "Pacific Life's extremely close relationship" with OCCBS, including its donations and the fact that a Pacific Life director had been honored as OCCBS's "Visionary of the Year" in 2010, and another Pacific Life director had previously served as "President of the Boy Scouts of America." Plaintiffs conceded that "outside trial counsel, [Thomas] Evans may not have known of these relationships but Pacific Life's in-house counsel (Kari Turigliatto) attended every day of trial and *undoubtedly* knew of the relationship between Pacific Life and the [OCCBS]." (Italics added.) Moreover, plaintiffs baldly asserted that "attorney Tuigliatto *presumably* followed *standard litigation protocol* and informed the officers of Pacific Life that one of the jurors in a multi-million dollar case was the district executive for [OCCBS]." (Italics added.)

Pacific Life's Opposition to the Motion

Pacific Life submitted three declarations in opposition to plaintiffs' new trial motion. The first, a handwritten declaration from Grennell, specifically disputed the plaintiffs' assertion that Grennell had intentionally concealed material information during voir dire.

In his declaration, Grennell criticized Rowel's declaration as inaccurate in several places, particularly regarding his purported knowledge at the time of trial concerning Pacific Life's donation history with OCCBS. Grennell stated: "I was so

unsure about [Pacific Life's] status [as a donor] that the following day I asked [our registrar] to look up Pacific Life's donor history. I found out that day that Pacific Life donated $1000 to our 'Man of Character' campaign in 2003 and in 2006 they pledged $100,000 to our capital campaign for our new camp that was paid in 2010. Neither campaign was part of my direct employment or connectivity. There are [thousands] of donors in Orange County. There's no way for me to know all of the donors." He stated: "I did not know that [Pacific] Life was a donor at the time of trial."

As for his knowledge of Pacific Life employees volunteering with OCCBS, he stated in his declaration that he knew of only one: the volunteer he supervised as his "training chair." He denied intentionally concealing his "connection" to Pacific Life, explaining that during voir dire "[i]t had not occurred to me that I had a connection to [Pacific] Life at that time. . . . [M]y relationship with my training chair is nowhere near the level of a 'Boyfriend and Girlfriend' as [peremptorily challenged juror] Mr. Tolbert's was. I had only known my training chair for a brief period of time prior to trial and I did not know what part of [Pacific] Life he worked for."

Grennell chided Rowel for omitting from her declaration his account of having "[gone] up to Deanna, the bailiff, a couple of days into the trial, when I thought about my relationship with my training chair, to disclose this fact. I went out of my way to make sure it was known . . . ." Grennell had told Rowel that he had similarly advised the bailiff "that I might have known a witness, Tim Kim" but "it turned out Mr. Kim was not the person that I knew." Grennell explained that he pointed out these disclosures to show that "I was trying very hard to be honest and open about everything. The worst thing that I could think of was to accidentally do something that would waste all of these people's time and resources."

The other two declarations Pacific Life submitted were from lead trial counsel Evans and in-house counsel Turigliatto denying that either knew of Pacific Life's

donations to OCCBS, or "of any 'relationship' between Pacific Life and [OCCBS] at the time of voir dire, 'extremely close' or otherwise."

In their reply, plaintiffs asserted a new basis for the new trial motion — judicial misconduct. Plaintiffs argued that if Grennell had been truthful about disclosing to the bailiff his relationship with his training chair, then trial court personnel had acted improperly: Plaintiffs argued either the bailiff failed to convey the juror's communication to the trial court, or the trial court ignored its duty to inform counsel of the juror's communication and put it on the record. Plaintiffs argued either would be misconduct. Plaintiffs requested an evidentiary hearing to determine the truth of Grennell's assertions, reasoning that either Grennell lied or there was judicial misconduct.

The Trial Court's Ruling Denying the New Trial Motion

The trial court issued a tentative ruling denying the new trial motion. The tentative ruling contained specific findings that Grennell did not "actively conceal anything" and, moreover, that Grennell was not biased in favor of Pacific Life.

The tentative ruling rejected plaintiffs' assertion of Grennell's bias with the following words: "The declaration [from investigator Rowel] merely traces plaintiffs' theory that Grennell 'must have' a bias in favor of Pacific Life since a connection exists between Grennell's employer (Boy Scouts) and defendant Pacific Life. A flow chart is needed to follow plaintiffs' theory. [¶] . . . [¶] This Court already concluded (with regard to [peremptorily challenged] jurors Tolbert and Sickles) that having a loved one working at Pacific Life was not sufficient evidence of bias to support a challenge for cause, and the evidence proffered against Grennell shows even less potential for bias. [¶] Where is the evidence that Grennell had a personal stake in the outcome? There is nothing."

At the hearing on the motion, plaintiffs renewed their request for an evidentiary hearing to establish a record regarding Grennell's purported disclosure to the bailiff of his relationship with his training chair. The trial court rejected the request,

adopted the tentative and denied the motion for new trial, specifically citing two California Supreme Court decisions holding that an investigator's declaration recounting a juror's hearsay statement is incompetent evidence to support a new trial motion based on juror misconduct.

DISCUSSION

A. Denial of the Motion For New Trial

Plaintiffs contend the trial court abused its discretion in denying the motion for new trial based on juror misconduct, attorney misconduct, and judicial misconduct. The argument lacks merit. The trial court acted within its discretion in denying the new trial motion.

1. Juror Misconduct

Plaintiffs accused Grennell of juror misconduct based on his purported intentional concealment of (1) his "bias" in favor of Pacific Life, and (2) his knowledge that Pacific Life provided financial and volunteer support to his employer OCCBS, information that would have led to their peremptory challenge of Grennell. The trial court rejected the juror misconduct claim, finding Grennell had neither concealed information during voir dire nor been biased in favor of Pacific Life.

We review those findings under the deferential standard of review set forth in *People v. Dykes* (2009) 46 Cal.4th 731, 809, as follows: "The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. [Citations.]"

Substantial evidence in the form of Grennell's declaration supports both of the trial court's findings here. Grennell's declaration established that he was simply unaware of the facts plaintiffs assert he intentionally concealed. Grennell stated in his

declaration that at the time of trial he did not know that Pacific Life was a donor to OCCBS, nor did he know of any Pacific Life employee who had volunteered with OCCBS, other than his training chair. Grennell stated that it did not occur to him to mention his relationship with his training chair during voir dire because "I don't think of him as a 'Pacific Life' employee. I think of him as my training chair." Grennell further explained: "I had only known my training chair for a brief period of time prior to trial and I did not know what part of [Pacific] Life he worked for."

Plaintiffs offered opposing evidence in the form of investigator Rowel's declaration. Rowel claimed that Grennell described Pacific Life as a long time donor of OCCBS, and that two of his volunteers were Pacific Life employees, one being the training chair he directly supervised. Plaintiffs argued that Grennell knew these facts were significant and that he should have revealed them during voir dire, given that he had observed two prospective jurors before him questioned closely about their loved ones' employment with Pacific Life and then peremptorily challenged by plaintiffs' counsel, presumably because of their indirect "relationship" with Pacific Life based on their loved ones' employment.

It was for the trial court, however, to weigh these conflicting declarations and determine which it found credible. Relevant to that task is case law holding that juror misconduct cannot be established by "'the declaration of a defense investigator that purports to relate a conversation with [a] juror.'" (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 811.) Consequently, the trial court acted within reason in crediting Grennell's declaration denying that he concealed any material information during voir dire; substantial evidence supports the trial court's finding that Grennell concealed nothing.

The evidence likewise supports the trial court's finding that Grennell was not biased in favor of Pacific Life. Grennell's declaration makes clear that at the time of trial, Grennell was unaware of any of the benefits (donations, volunteer help, institutional links) that Pacific Life had bestowed for years on OCCBS and that purportedly caused

Grennell to be biased in favor of Pacific Life. In other words, Grennell simply did not know of the "extremely close relationship" between defendant and his employer upon which plaintiffs based their argument of bias. As the trial court noted in its ruling, there was no evidence "Grennell had a personal stake in the outcome."

The trial court did not abuse its discretion in rejecting the claim of juror misconduct against Grennell.

2. Attorney Misconduct

Plaintiffs' new trial motion did not specifically allege attorney misconduct as a basis for granting a new trial. Instead, plaintiffs contended that in-house counsel Turigliatto had failed in her duty as an officer of the court to disclose Pacific Life's "extremely close relationship" (including donations and social and business ties) with OCCBS, the employer of a juror, and thus Pacific Life "forfeited its right to oppose a new trial," based on principles of estoppel.

The trial court impliedly rejected this argument when it denied the new trial motion, presumably because plaintiffs' argument was based on sheer speculation. Plaintiffs had asserted in the motion, with no evidentiary support, that Turigliatto "*undoubtedly* knew of the relationship between Pacific Life and the [OCCBS]." (Italics added.) In her own declaration, Turigliatto denied knowing of any relationship between Pacific Life and OCCBS.

On appeal, plaintiffs argue the new trial motion should have been granted on the basis of attorney misconduct alone. In a striking show of chutzpah, plaintiffs argue, essentially, that the declarations defense attorneys Turigliatto and Evans submitted denying knowledge of Pacific Life's donations and close ties with OCCBS did not *sufficiently* deny such knowledge on the part of *either* attorney at *any* time during the trial; consequently, the assertions must be "deemed established."

The argument is, of course, absurd. Plaintiffs failed to offer any evidentiary support in the trial court for their allegations, now characterized as "attorney

misconduct," that Pacific Life's attorneys knew and concealed that Pacific Life had a significant relationship with a juror's employer. Such rank speculation is no basis for a new trial.

3. Judicial Misconduct

Plaintiffs' final claim of misconduct, supposedly consisting of either the bailiff's or the trial judge's dereliction of duty, likewise has no merit.

Plaintiffs summarize their argument for judicial misconduct as follows: "If the information in Grennell's posttrial declaration had been disclosed to [the bailiff,] she would have reported the information to the trial judge and the trial judge, in turn, would have reported the information to trial counsel. . . . [Though] there was no discernible motive for [the bailiff] or the trial judge to breach their responsibilities and abandon court protocol," the trial court did *not* report the information to trial counsel, leading to one of two conclusions: Either court personnel violated a duty of reporting, thereby depriving plaintiffs "of a fair and reliable trial," or Grennell lied, thereby proving his intentional concealment of his bias in favor of Pacific Life. Thus, plaintiffs assert, the trial court erred in refusing to hold an evidentiary hearing or otherwise investigate Grennell's claim of disclosure to the bailiff.

In response, Pacific Life argues plaintiffs present "a false choice between perjury by a juror or misconduct by the trial court." We agree. We need not resolve the riddle plaintiffs pose.

Not only did the trial court properly refuse plaintiffs' request to hold an evidentiary hearing on the new trial motion (see *Linhart v. Nelson* (1976) 18 Cal.3d 641, 645 [in civil cases, new trial motion must be presented solely by affidavit]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1256 ["Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct"]), but no prejudice could have resulted from the claimed "judicial misconduct." The disclosure at issue concerned Grennell's relationship with his "training chair," who happened to work

for Pacific Life. The trial court found this relationship did not bias Grennell toward Pacific Life, and we have already determined substantial evidence supports that finding. Consequently, any trial court "mishandling" of this inconsequential disclosure could not have prejudiced plaintiffs.

The trial court properly denied the motion for new trial.

B. Exclusion of Evidence

Plaintiffs contend the trial court erred in excluding certain testimony relevant to their claim against Pacific Life for the negligent hiring of insurance agent Sherman. The negligent hiring claim was an alternative theory for holding Pacific Life vicariously liable for Sherman's allegedly fraudulent conduct in the event the jury found Sherman made misrepresentations to plaintiffs outside the scope of his agency for Pacific Life. The excluded evidence was that of plaintiffs' insurance industry expert, Burt Bernstein, who *would* have testified that Pacific Life acted negligently in failing to investigate adequately Sherman's pre-hiring disclosure of a claim made against him while in the employ of another insurance company.

In applying to be hired as an insurance agent with Pacific Life, Sherman had disclosed on an application form that in his 34 years as an insurance agent, he only had "'one complaint'" made against him: a "'nuisance lawsuit which was settled on March 19, 2006, without admission of liability on my part (insurance company was on my side).'" Plaintiffs later discovered the claim was settled for $350,000, and Bernstein was prepared to testify that Sherman's characterization of the claim as a mere "nuisance lawsuit" was deceptive, bordering on a lie, and this deception disqualified him from serving as an insurance agent. Moreover, Bernstein would have opined that Pacific Life was negligent in hiring Sherman without investigating his disclosure of the lawsuit, and thus his deception.

Pacific Life filed two motions in limine related to Bernstein's proposed testimony. Defense motion in limine No. 2 (MIL #2) sought to bar Bernstein's opinions

on three specific topics, including Pacific Life's purported negligence in regard to investigating the prior claim Sherman had disclosed. The asserted basis for excluding the "prior claim" testimony was that the evidence would lead to confusion and undue consumption of time, outweighing its probative value (Evid. Code, § 352)[1], among other grounds. The other relevant motion in limine was No. 10 (MIL #10) which was broader, seeking exclusion of evidence of all prior lawsuits and claims against Pacific Life and all the defendants, again on section 352 grounds (confusion and undue assumption of time), among others. The trial court granted MIL #10, but denied MIL #2.

During Bernstein's testimony at trial, plaintffs' counsel began questioning him regarding Sherman's answer on the job application form that, "yes," he had had a prior claim filed against him. Defense counsel objected based on the trial court's MIL #10 ruling, and the trial court sustained the objection, forbidding the area of inquiry. In chambers, plaintiffs' counsel argued for reversal of the ruling, but the trial court refused, excluding the testimony based on a "[section] 352 issue."

Plaintiffs argue on appeal that the trial court's exclusion of Bernstein's testimony under section 352 was an abuse of discretion that severely hampered their ability to prove their claim of negligent hiring. Plaintiffs argue: "There would have been no confusion or undue consumption of time . . . ." Moreover, plaintiffs argue the probative value of the evidence would have been high: "[T]he jury would have received expert testimony that pursuant to standards in the insurance industry Pacific Life was required to investigate the lawsuit and an investigation would have revealed that Sherman was 'unfit' . . . because Sherman had severely distorted the truth or outright lied on his application when [he described] the action [as] a 'nuisance lawsuit.'"

Of course, a trial court has wide discretion to rule on the exclusion of evidence based on section 352 (see *Austin B. v. Escondido School Dist.* (2007) 149

[1] All further statutory references are to the Evidence Code.

Cal.App.4th 860, 885), and the bar for obtaining reversal of such a ruling is set exceedingly high. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [reversible abuse of discretion requires showing that "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"]; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [to establish miscarriage of justice, appellant must show a "reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached"].) Nevertheless, we need not review the propriety of the trial court's ruling here because of a key fact Pacific Life points out: The jury's finding that Sherman made no misrepresentation to any of the plaintiffs mooted plaintiffs' negligent hiring claim "and made the exclusion of the prior settlement evidence immaterial and harmless."

As already discussed, plaintiffs' claim for negligent hiring was an alternative theory for finding Pacific Life vicariously liable for Sherman's fraud. (See *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 865 [permitting claim for vicarious liability based on negligent hiring, retention and supervision, for counselor's sexual harassment and abuse of minors].) Crucially, liability under a negligent hiring theory requires proof of some misconduct by the agent. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1159.) In the present case, the jury found that Sherman did not misrepresent any material fact to plaintiffs. Absent an underlying tort by Sherman, there was no liability to impute to Pacific Life under either a theory of agency or negligent hiring. Consequently, as a matter of law, plaintiffs suffered no prejudice from the trial court's exclusion of Bernstein's testimony that Pacific Life was negligent in failing to investigate Sherman's prior claim. The lack of any prejudice from the evidentiary ruling ends our inquiry into the ruling.

C. Instructional Error

Plaintiffs' final claim of error concerns the trial court's refusal to instruct the jury on a theory that Sherman "actively concealed" material facts from plaintiffs.[2] Pacific Life objected to plaintiffs' proposed concealment instruction on the ground that plaintiffs had presented no evidence at trial of concealment by Sherman, and had, instead, offered only evidence that Sherman had *affirmatively misrepresented* to plaintiffs (1) the policy terms regarding their ability to reduce the face amount (and thus the premiums) of the policies, and (2) the amount of his commissions. The trial court agreed with Pacific Life and rejected the requested jury instruction.

Plaintiffs argue the trial court erred in rejecting the concealment instruction because "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence" (*Soule*, *supra*, 8 Cal.4th at p. 572), and there was evidence in the record to support their theory "that Pacific Life had instituted a *corporate policy* to conceal the fact that [the life insurance policies in issue] could not be canceled before five years without paying substantial surrender charges." (Italics added.) Specifically, plaintiffs cite to evidence purportedly showing that Pacific Life intentionally omitted material information from client brochures and "policy illustrations" in an effort to conceal the relevant policy terms from prospective purchasers (including plaintiffs).

There are many problems with plaintiffs' argument of instructional error. The first *group* of problems has to do with waiver. Plaintiffs never requested a jury

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[2] The concealment instruction that plaintiffs proposed was as follows: "Plaintiffs claim that they were harmed because Gerald Sherman concealed certain information. To establish this claim, Plaintiffs must prove all of the following: [¶] (1) That Gerald Sherman actively concealed an important fact from Plaintiffs; [¶] (2) That Plaintiffs did not know of the concealed fact; [¶] (3) That Gerald Sherman intended to deceive Plaintiffs by concealing the fact; [¶] (4) That Plaintiffs reasonably relied on Gerald Sherman's deception; [¶] (5) That Plaintiffs were harmed; [¶] [and] (6) That Gerald Sherman's concealment was a substantial factor in causing Plaintiffs' harm."

instruction on a theory of "corporate concealment"; rather, they requested an instruction based on a theory of "active concealment" by Sherman himself. In a civil case, ""'"each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation . . . ."' Neither a trial court nor a reviewing court in a civil action is obligated to seek out theories plaintiff might have advanced, or to articulate for him that which he has left unspoken.'" (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131.) Thus, plaintiffs waived any claim of error based on the trial court's refusal to instruct on their "newly spun" theory (as Pacific Life puts it) of corporate concealment.

Plaintiffs' problems with waiver go further. Pacific Life aptly points out that plaintiffs failed to include the proposed (and rejected) jury instruction in their appellants' appendix on appeal. Instead, plaintiffs simply refer generally to "the trial court's refusal to give CACI No. 1901 on concealment." That generic reference conveniently concealed plaintiffs' fundamental problem, already discussed: that they had not requested an instruction on "corporate concealment,' but instead had proposed an instruction based on Sherman's active concealment.

Pacific Life argues that plaintiffs' failure to provide this court with a proper record for reviewing the claim of error waived the claim. It is well settled that a judgment is presumed correct, all presumptions are indulged to support it, and the appellant must affirmatively demonstrate error. (See *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) It is the appellant's burden "to provide a record sufficient to support its claim of error." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.) To establish instructional error, the appellant "must ensure that the appellate record includes the instructions given and refused and the court's rulings on proposed instructions." (*Ibid.*)

If we were to overlook plaintiffs' failure to include the proposed instruction in the appellate record, as plaintiffs ask us to do in their reply, then there is yet another

problem of waiver, having to do with the allegation in the complaint. Plaintiffs implicitly concede that there is no evidence in the record supporting a theory that Sherman actively concealed (as opposed to affirmatively misrepresented) the terms of the policies concerning the right to reduce face amount. Plaintiffs argue, however, that there is evidence in the record to support the theory that Sherman actively concealed his *commissions* from Grossman when Sherman failed to respond to Grossman's "written request" for that information.

It is debatable whether the particular evidence plaintiffs cite in support of this claim constitutes substantial evidence of Sherman's concealment of his commissions. What is not debatable is that the complaint does not contain any allegation that Sherman concealed his commissions. The complaint alleges Sherman concealed other information, such as policy terms, but not his commission. Instead, the complaint alleges specifically that Sherman affirmatively misrepresented his commission to plaintiffs.

Fraud must be pleaded with particularity. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Fuentes v. Tucker* (1947) 31 Cal.2d 1, 4-5.) Because plaintiffs did not allege Sherman concealed his commissions, plaintiffs waived their ability to rely on evidence he concealed his commissions to save their concealment jury instruction.

The trial court did not abuse its discretion in rejecting plaintiffs' jury instruction on concealment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.
IKOLA, J.